Filed 3/2/09 P. v. Guerrero CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY ALBERT GUERRERO, Defendant and Appellant.	G039973 (Super. Ct. No. 07CF3024) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Vicki Marolt Buchanan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Johnny Albert Guerrero appeals from a judgment entered after a jury found him guilty of possessing a controlled substance and possessing controlled substance paraphernalia. The trial court also found several prior prison term enhancement allegations true.

Defendant contends the trial court abused its discretion by admitting evidence of a trial witness's prior statements to a police officer because the witness testified at trial he could not remember making such statements. Defendant also contends the admission of such evidence violated the confrontation clause of the Sixth Amendment to the United States Constitution.

We affirm. The record establishes the trial court had a reasonable basis for concluding the witness was evasive and untruthful at trial. Thus, evidence of his prior statements to a police officer was properly admitted under the prior inconsistent statement exception to the hearsay rule. (Evid. Code, § 1235.) Furthermore, under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the admission of such evidence did not violate the confrontation clause because the witness was present at trial and available for cross-examination by defendant.

FACTS

At 10:00 p.m. on September 7, 2007, detectives Mauricio Estrada and Andy Alvarez of the Santa Ana Police Department arrived at a residence in Santa Ana to conduct a search. Alvarez entered a small detached garage located behind the residence, and saw Ramon Perez. Alvarez told Perez to exit the garage with his hands up. Alvarez saw that a portion of the garage was sectioned off by sheets. Suspecting there were other people behind the "sheeted partitioned-off area," Alvarez ordered everyone to come out from behind the sheets. Heather Rice, Bogart Cespedes, and defendant emerged and complied with Alvarez's directives.

In the sectioned-off area of the garage, Estrada found a spoon with a piece of cotton containing a dark tar-like substance which appeared to be melted heroin. The spoon was on a worktable along with a lined notepad; defendant's name "Johnny Guerrero" twice appeared on the second page of the notepad.

On an entertainment center in that same area, Estrada found three pieces of aluminum foil which had scorch marks along the bottoms and burnt residue on the tops consistent with smoking heroin. He also found digital scales, Q-tips, and 75 small Ziploc bags on the entertainment center. In addition, Estrada found on the worktable two glass pipes he recognized to be of the type commonly used to smoke methamphetamine. In the refrigerator in the garage, Estrada found a bag of baking soda which, he stated, was commonly used in the preparation of narcotics for sale. Alvarez arrested defendant, Perez, Rice, and Cespedes for possession of heroin and drug paraphernalia.

Alvarez testified at trial that, after reading Perez his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, Alvarez asked Perez what he was doing in the garage. Perez said he went to the residence because he had had an argument with his father and needed "to get away for a little bit." Perez stated he knew defendant, Rice, and Cespedes "from the street." He said that after he arrived and went into the garage, he saw defendant, Rice, and Cespedes doing drugs. Perez told Alvarez that defendant offered him a piece of aluminum foil with heroin on it, which Perez smoked. At trial, Perez testified he did not remember making those statements to Alvarez.

PROCEDURAL BACKGROUND

Defendant was charged in an information with possession of a controlled substance (heroin) in violation of Health and Safety Code section 11350, subdivision (a) (count 1) and possession of controlled substance paraphernalia in violation of Health and Safety Code section 11364 (count 2). The information alleged that, pursuant to Penal Code section 667, subdivisions (d) and (e)(1) and section 1170.12, subdivisions (b) and (c)(1), in October 1993, defendant was previously convicted of violating Penal Code

section 245, subdivision (a)(2), a serious and violent felony. The information further alleged that, pursuant to Penal Code section 667.5, subdivision (b), prior to the commission of the charged offenses, defendant suffered four convictions for which he "served a separate prison term of one year and more, and . . . did not remain free for a period of five years of both prison custody and the commission of the above felony offense."

Following a trial, the jury found defendant guilty as charged of both offenses. The trial court found the enhancement allegations true.

The trial court sentenced defendant to a total prison term of four years by (1) imposing double the two-year middle term for count 1, pursuant to Penal Code section 667, subdivisions (d) and (e)(1) and section 1170.12, subdivisions (b) and (c)(1); (2) suspending sentence on count 2; and (3) striking the remaining enhancement allegations for purposes of sentencing only. Defendant appealed.

DISCUSSION

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF PEREZ'S PRIOR STATEMENTS TO ALVAREZ.

Defendant contends the trial court abused its discretion by admitting evidence of Perez's statements to Alvarez under the prior inconsistent statement exception to the hearsay rule (Evid. Code, § 1235). He argues such prior statements were not inconsistent with his trial testimony stating he could not remember much of what occurred on the evening of September 7, 2007. We review the trial court's decision to admit that evidence for an abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.)

Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Section 770

provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

In *People v. Green* (1971) 3 Cal.3d 981, 988-989, the California Supreme Court held a witness's prior statements were properly admitted as inconsistent statements, even though the witness testified at trial that he could not remember the event, because the record showed the witness was deliberately evasive at trial. The Supreme Court stated: "In normal circumstances, the testimony of a witness that he does not remember an event is not 'inconsistent' with a prior statement by him describing that event. [Citation.] But justice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness. In contrast to [*People v.*]*Sam*[(1969) 71 Cal.2d 194], in which the witness had no recollection whatever of the prior incident, here [the witness] admittedly remembered the events both leading up to and following the crucial moment when the marijuana came into his possession, and to that moment his testimony was equivocal. For the reasons stated above, we conclude that [the witness]'s deliberate evasion of the latter point in his trial testimony must be deemed to constitute an implied denial that defendant did in fact furnish him with the marijuana as charged. His testimony was thus materially inconsistent with his preliminary hearing testimony and his extrajudicial declaration to [a law enforcement officer], in both of which he specifically named defendant as his supplier. Accordingly, the two prior statements of this witness were properly admitted pursuant to Evidence Code section 1235." (*People v. Green, supra,* 3 Cal.3d at pp. 988-989, fn. omitted.)

In *People v. Ledesma* (2006) 39 Cal.4th 641, 710-711, the California Supreme Court rejected the defendant's challenge to the admission of a witness's prior statements as inconsistent statements even though the witness testified at trial that she could not remember what the defendant had told her, what she had stated to the police, or what her prior testimony was in the case. The Supreme Court stated: "'[W]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] *As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper*.'" (*Id.* at p. 711, italics added.) The Supreme Court reasoned, in that case, "[a]lthough [the witness] consistently denied at trial being able to remember anything that defendant had told her, what she had told the police, or her prior testimony, the record provides a reasonable basis to conclude she was being evasive. [Citation.] She had been a friend of defendant's and admitted she was reluctant to testify and had failed to appear at a previous hearing. She claimed that even reading her prior testimony in full and listening to a tape recording of her police interview did not refresh her recollection." (*Id.* at p. 712.)

In this case, Perez testified at trial that he could not remember much of the evening of Friday, September 7, 2007. He remembered he went to the residence that night and entered the garage. When the prosecutor asked, "[w]ho else was in the garage when you went to the garage," Perez responded, "I can't remember." The prosecutor asked Perez if it would refresh his memory to see a copy of a statement in the police report; Perez responded, "[y]eah." After the prosecutor directed Perez to read a certain portion of that statement, Perez testified as follows:

"A. [Perez:] Do I have to read this?

"Q. [The prosecutor:] Yes. Have you read it?

"A. I don't know. I can't read it.

"Q. You can't read it?

"A. I don't want to read it.

"Q. You don't want to read it?"

The prosecutor stated, "[y]ou don't want to read to refresh your memory of the incident? Okay. [¶] May the record reflect that I did provide a portion of the statement, and he has refused to read that." The trial court stated, "[t]he record will so reflect." Perez thereafter testified he knows defendant "[a] little bit," has had "[a] little bit" of contact with defendant, but had not "hung out" with defendant.

The prosecutor asked Perez if he was afraid to testify and whether he was afraid of retaliation from defendant; Perez responded "[n]o." Defendant's counsel objected and the trial court held a sidebar conference with defendant's counsel and the prosecutor. Defendant's counsel asked for a mistrial on the ground the prosecutor's question about retaliation was improper. The prosecutor responded by stating, "Your Honor, I was just trying to lay the foundation for *Green*—under [*People v.*]*Green*[*, supra,* 3 Cal.3d 981]." The trial court stated, "[y]ou have an inconsistent statement" and denied defendant's counsel's motion for a mistrial. The trial court added, "the witness, I think, I should reflect for the record, is behaving kind of unusual way [*sic*]. [¶] And the refusal to read the report, at least the second page of the report, kind of balky wariness on his part. [¶] So I think we should get to the retaliation. He's denied it." The court further observed, "you have a clearly reluctant witness."

Defendant's counsel agreed with the trial court's observation, stating, "[n]o question about it." After the court further stated it was "[n]ot concerned about sufficient further foundations for [*People v.*]*Green*," defendant's counsel stated, "[n]or am I, Your Honor."

Perez thereafter testified that Rice lived at the residence in question and further stated he and Heather have used heroin together. He also testified that, on September 7, 2007, police officers arrived at the residence and arrested him for possession of drugs and paraphernalia. Perez testified he could not remember whether he

told Alvarez that (1) he had gone to the residence that night because he had had an argument with his father; (2) he knew defendant, Rice, and Cespedes; (3) when he arrived at the garage, he saw defendant, Cespedes, and Rice "all using drugs"; (4) defendant offered him a piece of aluminum foil with heroin on it; and (5) he smoked the heroin that defendant offered him.

The record establishes the trial court had a reasonable basis for concluding that Perez's trial testimony as to what he could not remember was evasive and untruthful. Perez refused to read a statement in the police report that he acknowledged would have helped to refresh his recollection of the events of September 7, 2007. The trial court observed that Perez was behaving unusually, and that Perez's refusal to read the police report showed "balky wariness" by Perez. The court stated Perez was clearly a reluctant witness and defendant's counsel agreed.

The trial court did not abuse its discretion by admitting Alvarez's testimony regarding Perez's prior statements.

II.

THE ADMISSION OF EVIDENCE OF PEREZ'S PRIOR STATEMENTS DID NOT VIOLATE THE CONFRONTATION CLAUSE.

Defendant contends his Sixth Amendment right to confrontation was violated when the trial court admitted evidence of Perez's prior inconsistent statements. Defendant did not raise this issue in the trial court. Even if he had, for the reasons we explain *post*, the admission of such evidence did not violate the confrontation clause.

In *Crawford, supra,* 541 U.S. 36, the United States Supreme Court "depart[ed] from the high court's established Sixth Amendment jurisprudence." (*People v. Rincon* (2005) 129 Cal.App.4th 738, 754.) Unfortunately, in support of his argument, defendant solely cites pre-*Crawford* authorities in his appellate briefs.

"Prior to *Crawford, supra,* 541 U.S. 36, 'the Supreme Court had held that an unavailable witness's out-of-court statement against a criminal defendant could be

admitted consistent with the [Sixth Amendment's] confrontation clause if it bore "adequate 'indicia of reliability.'" [Citation.] To qualify under that test, evidence had either to fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." [Citation.]'" (*People v. Geier* (2007) 41 Cal.4th 555, 597.)

In *Crawford*, the Supreme Court abandoned this approach and held that the confrontation clause prohibits "admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford, supra,* 541 U.S. at pp. 53-54; see *People v. Geier, supra,* 41 Cal.4th at p. 597.)

The United States Supreme Court also specifically addressed whether admission of a trial witness's prior statements violates the confrontation clause, stating: "[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. [Citation.] It is therefore irrelevant that the reliability of some out-of-court statements '"cannot be replicated, even if the declarant testifies to the same matters in court."' [Citation.] The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." (*Crawford, supra,* 541 U.S. at p. 59, fn. 9.)

In *People v. Gunder* (2007) 151 Cal.App.4th 412, 419, the appellate court rejected the defendant's argument that "a witness who appears at trial but feigns a lack of memory should nonetheless be considered unavailable," thereby rendering such a witness's prior statements inadmissible under the confrontation clause. The defendant in *People v. Gunder* had argued that, unlike a witness with genuine memory loss, who is considered available for cross-examination, "a witness who refuses to answer questions through a feigned memory loss should be deemed the equivalent of a witness who entirely refuses to answer questions." (*Ibid.*)

The appellate court in *People v. Gunder, supra*, 151 Cal.App.4th at page 420 held that the admission of a trial witness's prior statement after the witness feigned memory loss did not violate the confrontation clause, stating: "The circumstance of feigned memory loss is not parallel to an entire refusal to testify. The witness feigning memory loss is in fact subject to cross-examination, providing a jury with the opportunity to see the demeanor and assess the credibility of the witness, which in turn gives it a basis for judging the prior hearsay statement's credibility. '[W[hen a hearsay declarant is present at trial and subject to unrestricted cross-examination . . . the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements.' [Citation.] In the face of an asserted loss of memory, these protections 'will of course not always achieve success, but successful cross-examination is not the constitutional guarantee.' [Citation.]"

Perez was present at trial and available for cross-examination by defendant. Perez did not refuse to testify but instead, as discussed *ante*, feigned memory loss with regard to specific aspects of the events that transpired on September 7, 2007. The admission of Perez's prior statements, therefore, did not violate the confrontation clause.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.